No. 12257

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

APPELLANTS' REPLY BRIEF.
and
CROSS-APPELLEES' BRIEF.

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PART I—APPELLANTS' REPLY BRIEF.[1]

.. Appellants Were Credited With and Paid for Only Their Regularly Scheduled Shift Hours and Received No Credit or Pay for Their Work During Lunch Periods.

Appellee argues that the appellants were credited with nd paid for 48 hours of work with overtime at time and ne-half for the 8 hours in excess of 40. This, however, vas not the case. As the contract clearly shows, the appellants were scheduled to work 45 hours per week on

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[1]This brief, like that of Appellee and Cross-Appellant, is in two parts, the first being Appellants' closing argument and the second being Appellants' and Cross-Appellees' reply to Cross-Appellants' opening brief.

the second shift and 42 hours per week on the third shift. They were paid for only those 45 and 42 hours, and for no additional hours. They were not paid for 48 hours; the figure 48 was simply used to compute the amount of pay for those 45 and 42 hours.[2] That the actual rate of pay was the "base rate" plus the time differential plus the percentage differential divided by the scheduled shift hours is clearly established by Appellee's own witness, Clair Irwin. He testified:

> ". . . on graveyard they blew it up and paid actually, instead of seven and one-half hours plus one-half hour allowed time, they only paid them seven and one-half hours but the rate had been ballooned so he got the same amount of pay as if he had been working under the old schedule . . ." [Tr. p. 152.]

> "Q. I see. In the case of Hector, whose rate before the week ending November 19, 1944, was $1.72 and whose rate, as shown on the card for the week following 11-19-44 was $1.97.1, that difference in rate did not represent an increase in pay for the man, did it? A. No.
>
> Q. He got before that change that was made exactly the same amount of money for each hour he worked as he got after the change was made? A. That is correct.

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[2]"Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%) . . . Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%)." [Ex. 1, par. 5.]

Q. In other words, then, Mr. Irwin, so that we understand your testimony, if Mr. Hector before the week of November 19, 1944, had come in on his graveyard shift and worked only two hours, and then gone home, he would have been paid two times $1.97.1? A. That is right.

Q. Even though his basic rate, as shown on the card was $1.72? A. Yes; that is right; that is right." [Tr. pp. 155-156.]

Thus Appellee's entire argument is based upon a premise which finds no foundation in fact. Its own examples given on page 8 of its Brief demonstrate the fallacy of the argument. In order to apply the examples to the fact situation here presented, the $1.00 base rate must be translated into the actual rate per hour. By the testimony of Appellee's own witness, the actual rate per hour for the swing shift employee mentioned in the first example would be $1.06⅔ (the 45 hours for which Appellee paid divided into $48.00). For the 48 hours actually worked (45 hours scheduled plus 6 one-half hour lunch periods), Appellants should have been paid $55.46 (40 hours x $1.06⅔ plus 8 hours x $1.06⅔ x 1½).

The 1949 amendments to the Fair Labor Standards Act do not relieve Appellee of its liability to Appellants. Section 7(d)(6) upon which Appellee relies simply provides that the time and one-half paid in the enumerated instances shall not be included in the "regular rate." Neither the "time" allowance nor the percentage allowance are in any category listed in Section 7(d)(6), and Appel-

lants have never contended that the time and one-half paid for the sixth day worked in the work week served to increase the rate of pay.

Since the contract and the testimony of Mr. Irwin both establish that the "allowed hours" differential as well as the percentage differential were increases to be included in the regular rate of pay, and upon the further testimony of Mr. Irwin that the Appellants were not paid for the time involved herein [Tr. p. 155], the Appellants are entitled to compensation for their lunch periods worked at time and one-half the regular rates which include both of the shift differentials.

PART II—REPLY TO CROSS-APPELLANT'S OPENING BRIEF.

1. Cross Appellees Are Entitled to the Benefits of the Fair Labor Standards Act.

Cross-Appellant argues that the Cross-Appellees were not subject to the Fair Labor Standards Act at all, relying upon *U. S. Cartridge Co. v. Powell* (C. A. 8, 1949), 174 F. 2d 718, which held that the provisions of the Walsh-Healy Public Contracts Act and the Fair Labor Standards Act are mutually exclusive. As Cross-Appellant points out, certiorari has been granted by the Supreme Court, and Cross-Appellees respectfully submit that for the following reasons the soundness of this decision is open to serious question.

Nothing contained in either of the two acts there involved provide any basis for inferring that it was the intent of Congress that where one act would apply the other would not. If such an inference could be drawn the question might well be asked upon what basis can a court determine which of the acts should apply. In other words, in the *U. S. Cartridge Co.* case one would look in vain for a sound reason for holding the Walsh-Healy Act applicable but not the Fair Labor Standards Act. It would have been equally logical to hold the Fair Labor Standards Act applicable and not the Walsh-Healy. The simple fact of the matter is that both acts may apply and were intended by Congress to apply according to their terms: *i. e.,* where the performance of Walsh-Healy contracts also involves production of goods for commerce, both acts apply.

Concrete indication that Congress did intend both acts to be applicable and that one does not exclude the other may be found in Section 1 of the Portal-to-Portal Act of 1947, where Congress expressly finds that because of certain judicial interpretations of the Fair Labor Standards Act "the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased, the public Treasury would be seriously affected by consequent increased cost of war contracts." If Congress thought the Fair Labor Standards Act would not apply to the performance of contracts subject to the Walsh-Healy Act then there could be no basis for this finding.

Apart from the question as to its soundness, the *U. S. Cartridge Co.* case is not applicable to the case at bar since neither the employees nor the employer here were engaged in the performance of any contract subject to the Walsh-Healy Act. The rationale of the *U. S. Cartridge Co.* case was that the Walsh-Healy Act sets up a complete system of labor standards and establishes a complete procedure whereby the Government enforces those standards even to the point of collecting for the employees any wages due them by reason of failure to meet those standards. The Maritime Commission wage statute here involved makes no comparable provisions either for enforcement or for collection of wages. Nothing therein contained indicate any Congressional intent to substitute its provisions for the provisions set forth in the Fair Labor Standards Act.

2. The Master Labor Agreement Contains the Express Provisions Contemplated by Section 2 of the Portal Act for Making the Time Worked Involved Herein Compensable.

This court has had occasion to consider the precise question here presented and determined that the provisions of the Master Labor agreement made compensable the activities out of which Cross-Appellants' claims arise.

> *Mills v. Joshua Hendy Corp.* (C. A. 9, 1948), 169 F. 2d 898.

Cross-appellant seeks to limit the effect of this holding to the day shift only. The decision in the *Mills* case on this point applied to both the day and the graveyard shifts. The same facts and the same principles apply with equal force to all three shifts.

An examination of the contract reveals that its express provisions define the shifts as constituting 8, 7½ and 7 hours of working time respectively and require the employer to pay time and one-half for all hours worked in excess of those defined shifts.

The cases deciding this problem on the merits[3] uniformly support the decision of this court in the *Mills* case.

In *Central Missouri Telephone Co. v. Conwell* (C. A. 8, 1948), 170 F. 2d 641, the Court of Appeals ruled that certain inactive time of the employees while they were required to be on duty and subject to being called momentarily to perform duties, was compensable and that Section 2 of the Portal Act did not purport to affect its compensability.

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[3]Cases which appear to reach a contrary result are invariably decisions which only involve the sufficiency of the pleadings.

In the recent case of *Frank v. Wilson & Co.* (C. A. 7, 1949), 172 F. 2d 712, the plaintiffs were mechanics who were required to be present, dressed and ready for work five minutes before the scheduled start of the shift. During that five minutes they received instructions, obtained tools, started out for their various places of work in the plant and performed similar activities which were also performed by them from time to time as occasion arose during their regularly scheduled hours of work. The union contract provided "Employees who are required to work over eight hours in any one day . . . will be paid one and one-half times their regular rate for all such overtime hours." The Court held that the activities performed within the five minutes before the shift were covered by the express provision of the written contract quoted above and were, therefore, compensable under the Fair Labor Standards Act as amended by Section 2 of the Portal Act.[4] In support of its holding the Court referred to the decision of this Court in the *Mills* case and quoted that portion which set forth the contract provisions now before the Court.

In addition to the foregoing decisions of the Courts of Appeals for the Seventh, Eighth and Ninth Circuits, a

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[4]The court below, in addition to interpreting that provision of the contract as meeting the requirements of Section 2, also held that the compensability of the activities by reason of custom or practice within the meaning of Section 2 was established by a showing that the same or similar activities were paid for when performed during the regular shift hours. In the case at bar by stipulation the issue has been narrowed to compensability by the express provisions of the contract, but the analogy is obvious. If custom and practice of paying for the activities during shift hours establish their compensability outside of shift hours, then clearly where the *contract* makes the activities compensable when performed during shift hours, it also makes them compensable when required to be performed outside of shift hours.

number of District Courts have reached the same conclusions.

McLaughlin v. Todd & Brown, Inc. (N. D. Ind., 1948), 15 Labor Cases, Par. 64606;

Green v. LeVan (E. D. Tenn., 1948), 15 Labor Cases, Par. 64777;

In the Matter of Kellett Aircraft Corp. (E. D. Pa., 1949), 17 Labor Cases, Par. 65347;

Knudsen v. Lee & Simmons (S. D., N. Y., 1949), 17 Labor Cases, Par. 65374.

3. The Evidence Establishes That Cross-Appellee Biggs, Like Each of the Other Appellants, worked During His Lunch Period Each and Every Day.

After describing his claim for lunch periods and defining his activities during those lunch periods, Mr. Biggs testified:

"Q. At any time during your shift were you relieved of your duties for the purpose of taking your lunch? A. No, sir." [Tr. pp. 67-68.]

". . . I usually started to eat my lunch and I never did get a complete lunch eaten at one sitting. In other words, I would eat a sandwich, someone would come in or there would be a phone call or I would have to go hunt for a part, because there were certain employees in the yard, maintenance men there that came in at that time to get the parts." [Tr. p. 69.]

Even if it were not for this and similar testimony, and if the testimony quoted by the Cross-Appellant were the only testimony on the point, nevertheless the court below

was bound to make its finding that Biggs worked during his lunch period each and every day.

The question of what constitutes time worked within the meaning of the Fair Labor Standards Act is not answered alone by whether or not actual duties were performed during each and every lunch period.

All courts which have passed upon the point have held or expressed the opinion that lunch periods must be counted as time worked unless the employee is relieved of all duties for a sufficient length of time to devote uninterruptedly to his own purposes.

Lofton v. Seneca Coal and Coke Co. (N. D. Okla., 1942), 6 Labor Cases, Par. 61,271, aff'd (C. A. 10, 1943), 136 F. 2d 359;

Walling v. Dunbar Transfer & Storage, Inc. (D. C. Tenn., 1943), 7 Labor Cases, Par. 61,565;

Sunshine Mining Co. v. Carver (D. C. Ida., 1941), 41 Fed. Supp. 60;

Tenn. C. I. & R. Co. v. Muscoda Local No. 1123 (D. C. Ala., 1941), 40 Fed. Supp. 4, 10, modified on other grounds, 321 U. S. 590;

Armour & Co. v. Wantock (1941), 323 U. S. 126;

Skidmore v. Swift & Co. (1944), 323 U. S. 134;

Fox v. Summit King Mines (C. A. 9, 1944), 143 F. 2d 926.

The evidence conclusively establishes that Biggs was not relieved of his duties but on the contrary was kept on duty during the entire period of his shift, including the scheduled lunch periods every day. He therefore is entitled to additional compensation for each and every day.

Conclusion.

The evidence establishes without contradiction that none of the Appellants was credited or paid for any time beyond the regularly scheduled shifts—which excluded the lunch periods. They were paid a time premium and a percentage premium strictly as shift differentials which served to increase their rates of pay. Neither constituted pay "for hours not worked." No credit or payment having been received for lunch periods worked, Appellants are entitled to be paid for them.

Since the decision of *U. S. Cartridge Co. v. Powell* is under review by the Supreme Court and, it is respectfully submitted, is not sound in principle, it should not be given weight in support of Cross-Appellant's argument. At all events, it is clearly distinguishable from the case at bar for the reason that the statute applicable to the performance of the contract here involved is not comparable in scope, design, intent or purpose to the Walsh-Healy Act applicable in the *U. S. Cartridge Co.* case.

The Appellants were required by their employer to remain on duty and perform the same activities during their lunch periods as during their shifts; the contract provided that lunch periods were excluded from the shifts and that the employees should be paid time and one-half for hours worked over and above their shifts. Accordingly, the

activities performed during the lunch periods were expressly made compensable by the terms of the contract.

Appellants respectfully submit, therefore, that the judgment of the court below should be reversed insofar as it denies them compensation for their work performed during their lunch periods on the swing and graveyard shifts and that it be affirmed in all other respects.

Respectfully submitted,

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